

**STATE OF MICHIGAN
IN THE SUPREME COURT**

MARIE DEAN, Personal Representative of the
Estates of TALEIGHA MARIE DEAN, Deceased,
CRAIG LOGAN, Deceased, AARON JOHN DEAN,
Deceased, CRAIG LOGAN DEAN, Deceased,
and EUGENE SYLVESTER, Deceased,
Plaintiff-Appellee,

Supreme Court
No. 126393

Court of Appeals
No. 244627

v

JEFFREY CHILDS and ROYAL OAK
TOWNSHIP,
Defendants-Appellants,

Oakland County Circ. Ct.
No. 01-029844-NO

and

DAVID FORD, FRANK MILES, JR., FRANCES
THURMAN, JERRY SADDLER, and CYNTHIA
PHILLIPS,
Defendants.

**AMICUS CURIAE BRIEF OF THE CITY OF DETROIT
IN SUPPORT OF DEFENDANT-APPELLANT JEFFREY CHILDS'
APPLICATION FOR LEAVE TO APPEAL TO THE MICHIGAN SUPREME
COURT**

CITY OF DETROIT LAW DEPARTMENT

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STATEMENT OF QUESTIONS PRESENTED

- I. WHETHER THE EFFORTS TAKEN BY FIREFIGHTERS TO EXTINGUISH A FIRE MAY BE THE PROXIMATE CAUSE OF THE DEATHS OF PLAINTIFF'S DECEDENTS AS "THE PROXIMATE CAUSE" IS DEFINED FOR PURPOSES OF THE GOVERNMENTAL TORT LIABILITY ACT, MCL 691.1407(2)?

The Court of Appeals Answered, "Yes."

Defendants-Appellants Answer, "No."

- II. WHETHER FIREFIGHTERS OWE AN ACTIONABLE DUTY IN TORT TO PERSONS WHO MAY BE INJURED IN THE FIRE?

The Court of Appeals Answered, "Yes."

Defendants-Appellants Answer, "No."

STATEMENT OF JURISDICTION

The City of Detroit incorporates by reference the Statement of Jurisdiction found in Defendants-Appellants Application for Leave to Appeal filed June 22, 2004.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

This matter is currently pending before this Court on Defendant-Appellant Jeffrey Childs' application for leave to appeal a decision of the Michigan Court of Appeals which exposes firefighters to liability for injuries or fatalities suffered by fire victims. As Michigan's largest city, the city of Detroit has an obvious interest in any ruling which expands public employee liability.

The facts of this matter have been outlined in Defendant Childs' application and will only be briefly discussed herein. Defendant Childs was the shift supervisor on April 6, 2000, when he and other firefighters responded to a fire at Plaintiff's home which was allegedly set by an arsonist. At Defendant Childs' direction, water was sprayed into the front of the home. Plaintiff alleged this action caused the death of the four minor decedents, who were trapped in the rear of the home, by driving smoke and fire to the rear. Dean v Childs, 262 Mich App 48, 51; 684 NW2d 894 (2004).

Defendant Childs unsuccessfully sought summary disposition pursuant to MCR 2.116(C)(7) &(8) based on MCL 691.1407, which grants public employees immunity in tort unless it can be demonstrated that their gross negligence was "the proximate cause" of the injuries and based on the absence of a duty in tort to Plaintiff's decedents. The Court of Appeals held that Plaintiff presented sufficient evidence that Childs' conduct was "the" proximate cause of the injuries. Relying on Beaudrie v Henderson, 465 Mich 124; 631 NW2d 308 (2001), the Court also held that the public duty doctrine was inapplicable to firefighters.

Defendant Childs filed an application for leave to appeal to this Court on June 22, 2004. Because of its far-reaching implications concerning the provision of an absolutely essential public

service for urban life, the City of Detroit supports Defendant Childs' application for leave and for reversal of the Court of Appeals decision.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN CONCLUDING THAT PLAINTIFF PRESENTED SUFFICIENT EVIDENCE THAT CHILDS' CONDUCT WAS THE PROXIMATE CAUSE OF PLAINTIFF'S DECEDENTS' INJURIES.

The Court of Appeals' decision represents a serious and unwarranted departure from this Court's decision in Robinson v City of Detroit, 462 Mich 439; 613 NW2d 307 (2000). Robinson, like the case here, contained a claim against individual city employees, filed pursuant to MCL 691.1407(2), which provides that governmental employees may be liable for grossly negligent conduct if that conduct is "the proximate cause of the injury. . ." The Robinson court overruled the Court's previous decision in Dedes v Asch, 446 Mich 99; 521 NW2d 488 (1994), and concluded as follows regarding the construction of the phrase "**the** proximate cause:"

We overrule Dedes to the extent that it interpreted "the proximate cause" . . . to mean "a proximate cause." The Legislature's use of the definite article "the" clearly evinces an intent to focus on one cause. The phrase "the proximate cause" is best understood as meaning the one most immediate, efficient, and direct cause preceding the injury. Robinson, *supra*, pp 458-459.

The impact of this ruling on the case here is clear: as governmental employees, these officers can only be found liable if their conduct was the "most immediate, efficient, and direct cause preceding the injury." Clearly, even accepting all of Plaintiff's contentions and speculations as true, Defendant Childs' actions do not fall within this description.

In reaching its conclusion, the Court of Appeals in Dean held as follows:

Plaintiff presented evidence that Childs's conduct was "the

proximate cause” of the children’s deaths. “The proximate cause” has been defined as “the one most immediate, efficient, and direct cause preceding an injury, not ‘a proximate cause.’” . . . While it is likely that the arsonist was “a proximate cause” of the children’s deaths, plaintiff’s evidence, if proven, would show that the children would have survived the fire if Childs had not acted in a grossly negligent manner. Id., at p 58.

The Court of Appeals simply applied a “but-for” test and concluded that Childs’ alleged conduct met that test. Other than a recital of the Robinson standard, there is absolutely no distinction between the analysis applied here and the traditional but-for standard for proximate cause. Robinson, however, clearly requires a much more definitive role in causing the injury. These children died as a result of fire which was set by an arsonist. Clearly, the fire, a force which was not set in motion by Childs, was the most immediate, direct, and efficient cause of their death.

The application of a “but-for” test in effect resurrects Dedes by effectively interpreting the proximate cause as a proximate cause. Robinson, supra, at 458. Indeed, the Court’s reasoning here, based on a conclusion that the children would have survived the fire but for Childs’ conduct would have led to a different result in both cases ruled upon in Robinson. Both cases there involved innocent passengers in stolen vehicles, while the vehicle in Robinson was pursued because of erratic driving, the Cooper vehicle was pursued because police noted that the driver appeared to be too young to operate a vehicle. Neither vehicle was targetted because of excessive speed. Nonetheless, the Court there concluded that as a matter of law the individual officers were not liable because “The one most immediate, efficient, and direct cause of the plaintiffs’ injuries was the reckless conduct of the drivers of the fleeing vehicles.” Robinson, supra, at 462. The Dean decision reduces Robinson to meaningless verbiage which will be readily overcome by ambitious

plaintiffs.

II DEFENDANT-APPELLANT CHILDS OWED NO DUTY IN TORT BASED ON EITHER THE PUBLIC DUTY DOCTRINE OR COMMON LAW PRINCIPLES OF TORT LIABILITY.

A. Sound Reasons Support the Application of the Public Duty Doctrine to Firefighters.

Duty is a question of law to be decided by the Court. Maiden v Rozwood, 461 Mich 109, 135; 597 NW2d 817 (1999). The lower court here concluded that the public duty doctrine did not apply to Defendant Childs because the decision in Beaudrie explicitly limited application of that doctrine to police officers only. The City maintains that the issue of the applicability of the public duty doctrine to firefighters has not been directly considered by the Court, but notes that the very reasons which support its applicability to police officers are at play here and support an extension of the doctrine to firefighters.

In White v Beasley, 435 Mich 308, 320-321; 522 NW2d 1 (1996), Justice Brinkley wrote as follows regarding police officers and their need for the protection afforded by the public duty doctrine:

[W]e recognize that police officers are employed to work in a 'milieu of criminal activity where every decision is fraught with uncertainty.' (Citation omitted.) Because of the unusual and extraordinary nature of police work it is unfair to allow a 'jury of laymen with the benefit of 20/20 hindsight to second-guess the exercise of a policeman's discretionary duty.' (Citation omitted.) .

..

Police officers must work in unusual circumstances. They deserve

unusual protection.

Similarly, in his concurring opinion, Justice Cavanagh also discussed the unique nature of police work as justifying the protection of the public duty doctrine. Id., at p 331-332. Justice Cavanagh also added, “Although I am limiting the focus of my opinion to police officers, I believe that it would similarly apply to fire fighters, life guards, and similar governmental safety professionals.” Id., ftn 1.

In Beaudrie, supra, at 141, the court reaffirmed the reasons in support of the public duty doctrine’s application to police officers stating as follows:

[W]e will, however, continue to apply the public duty doctrine, and its concomitant "special relationship"exception, in cases involving an alleged failure to provide police protection. We agree with Chief Justice Brickley's statement in White that "police officers must work in unusual circumstances. They deserve unusual protection."

Firefighters also work under unusual circumstances and stresses which merit unusual protection. Like police officers, their work requires split second decision making and often requires them to risk their lives or physical safety. It is axiomatic in construing the law that the reasons underpinning a rule be examined. Simply put, “**The rule follows where its reason leads**; where the reason stops there stops the rule.” (Emphasis added.) Karl Llewellyn, The Bramble Bush, 157-158 (1960). The very reasons for applying the public duty doctrine to police officers support its application to fire fighters as Justice Cavanagh recognized in his opinion.

Although never directly addressed by this Court, the instant case presents an opportunity

for this Court to remedy this gap and extend the public duty doctrine to fire fighters. Fire fighters also deserve the protection of the public duty doctrine.

B. No Duty Is Owed Even Under Common-Law Standards.

Beaudrie held that as to non-police governmental employees, duty would be determined by the application of common law principles. In Williams v Cunningham Drug, 429 Mich 495, 498; 418 NW2d 381 (1988) the Court noted that at common law “as a general rule, there is no duty that obligates one person to aid or protect another.” That general rule can however be abrogated by a special relationship involving the defendant. In Beaudrie, supra, at 140-141, the Court stated as follows:

Moreover, the public duty doctrine as applied in White is consistent with the general common-law rule that no individual has a duty to protect another who is endangered by a third person's conduct absent "a 'special relationship' either between the defendant and the victim, or the defendant and the third party who caused the injury." Murdock v Higgins, 454 Mich 46, 54; 559 NW 2d 639 (1997).

In Buczkowski v McKay, 441 Mich 96, 103; 490 NW2d 330 (1992), the Court reiterated this principle, holding that, "The duty to protect others against harm from third persons is based on a relationship between the parties." See also Brown v Jones, 200 Mich App 212; 503 NW2d 735 (1993)(generally no duty to protect an individual from harm by a third party; such duty “may arise where one stands in a special relationship with the victim or the person causing the injury . . .”)

As the Court held in Murdock, at 55:

Generally, an individual has no duty to protect another who is endangered by a third person’s conduct. Where there is a duty to

protect an individual from a harm by a third person, that duty to exercise reasonable care arises from a “special relationship” either between the defendant and the victim, or the defendant and the third party who caused the injury.

Plaintiff here has failed to establish a relationship between the deceased children and Defendant Childs.

RELIEF REQUESTED

Based on the foregoing and the argument contained in Defendant-Appellant Childs' application for leave to appeal, the City of Detroit respectfully requests this Honorable Court to grant Defendant-Appellant Jeffrey Childs' leave to appeal the decision in Dean v Childs, and upon review reverse the decision of the lower court.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "S. D. Blackmon", written over a horizontal line.

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